Masboh Trading Sdn Bhd v Mejaris Builders Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP NO D2–28–110 OF 1999
ABDUL AZIZ J
28 FEBRUARY 2001

Companies and Corporations *— Winding up — Inability to pay debts — Petitioner left copy of petition with clerk of respondent company at respondent company's business address — Whether failure of petitioner to serve petition at the respondent company's registered address means that the respondent company cannot be deemed to be unable to pay its debts — Companies Act 1965 s 218(2)(a)*

The petitioner in this case sought to wind up the respondent company on the ground that the company was unable to pay its debts. A statutory demand was served on the clerk of the respondent company at the business address of the company, not at the registered office as required by s 218(2)(a) of the Companies Act 1965 ('the Act'). It is not disputed that the company did actually received the demand. The issue in this case is whether by the failure of the petitioner to serve the statutory demand 'by leaving it at the registered office', as required by the said para (a), the company cannot be deemed under the said sub-s 2(a) of the Act to be unable to pay its debts, notwithstanding that the demand was in fact received by the company.

Held, ordering winding up of the company:

In order for the statutory demand to be effective it must strictly comply with the requirement that it be served on the company by leaving it at the registered office; *United Malayan Banking Corp Bhd v Richland Trade & Development Sdn Bhd* [2000] 1 CLJ 57 followed. Section 218(2)(a) of the Act does not create a separate ground for winding up instead it provides a mode of proof available in aid of an application seeking a winding up on the ground specified in s 218 of the Act viz that the company is unable to pay its debts. A company that fails to heed a valid notice will not be wound up if it is able to establish independent evidence that it is solvent; *Malaysia Air Charter Co Sdn Bhd v Petronas Dagangan Sdn Bhd* [2000] 4 CLJ 437 followed. The respondent company in this case is deemed to be unable to pay its debts. There is no evidence to show that it is actually able to pay its debts or is commercially solvent (see pp 372B, F, 373A).

[Bahasa Malaysia summary

Pempetisyen di dalam kes ini telah memohon untuk menggulung responden syarikat atas alasan bahawa syarikat tersebut tidak mempu membayar hutangnya. Tuntutan statutori telah disampaikan ke atas kerani responden syarikat di alamat perniagaan syarikat tersebut, bukan di pejabat berdaftar sebagaimana yang diperlukan oleh s 218(2)(a) Akta Syarikat 1965 ('Akta tersebut'). Adalah tidak

dipertikaikan bahawa syarikat tersebut sememangnya telah menerima tuntutan' tersebut. Persoalan di dalam kes ini adalah sama ada kegagalan pempetisyen-pempetisyen untuk menyampaikan tuntutan statutori sebagaimana yang diperlukan oleh perenggan (a) bemakna syarikat tersebut dinaggap tidak mamou membayar hutangnya.

Diputuskan, memerintahkan penggulungan syarikat tersebut:

Bagi membolehkan tuntutan statutori tersebut berkesan ia mestilah dengan ketat memenuhi keperluan bahawa ia disampaikan ke atas syarikat tersebut dengan meninggalkannya di pejabat berdaftar; *United Malayan Banking Corporation Bhd v Richland Trade & Development Sdn Bhd* [2000] 1 CLJ 57 diikut. Seksyen 218(2)(a) Akta tersebut tidak membentuk satu alasan berasingan untuk penggulungan tetapi ia memperuntukkan satu cara pembuktian yang sedia ada bagi membantu di dalam permohonan satu penggulungan atas alasan yang dispesifikasikan dalam s 218 Akta tersebut iaitu syarikat tersebut tidak mampu membayar hutangnya. Sebuah syarikat yang gagal utnuk memberi perjatian kepada sati notis tidak akan digulungkan j*ika ia boleh mengemukakan keterangan sendiri bahawa ia solven; Malaysia Air Charter Company Sdn Bhd v Petronas Dagangan Sdn Bhd* [2000] 4 CLJ 437 diikut. Syarikat di dalam kes ini dianggap tidak mampu untuk membayar hutangnya. Tiada keterangan yang menunjukkan bahawa ia sebenarnya mampu untuk membayar hutangnya atau adalah secara komersial solven (lihat ms 372B, F, 373A).]

Notes

For cases on winding up generally, see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 760–1151.

Cases referred to

Ann Joo Metal Sdn Bhd v Pembenaan MY Cahaya Sdn Bhd [2000] 5 MLJ 708 (refd)

Cymun Development Sdn Bhd v Supermax Sdn Bhd [1995] 2 MLJ 233 (refd)

Malaysia Air Charter Company Sdn Bhd v Petronas Dagangan Sdn Bhd [2000] 4 CLJ 437 (folld)

Pac Asian Services Pte Ltd v European Asian Bank AG [1983] 3 MLJ 385 (refd)

United Malayan Banking Corporation Bhd v Richland Trade & Development Sdn Bhd [2000] 1 CLJ 57 (folld)

Legislation referred to

Companies Act 1965 ss 218(2)(a), 254(2)(a)
Companies (Winding-up) Rules 1972 r 30(1)

Ang Gim Yan (*SB Cheah & Assoc*) for the petitioners.
SL Ong (*SL Ong & Partners*) for the respondents.

Abdul Aziz J: This winding up petition is based on the ground that the respondent company is unable to pay its debts, for proof of which the petitioners rely on the provisions of sub-s (2)(a) of s 218 of the Companies Act 1965 ('the Act'), which provides as follows:

> (2) A company shall be deemed to be unable to pay its debts if —
>
> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor

The demand under paragraph (a) in this case ('the statutory demand') was served on a clerk of the company at the business address of the company, not at the registered office as required by the paragraph. It is not disputed that the company did actually receive the demand.

I have rejected the company's affidavit in opposition to the petition for non-compliance with the requirement as to time of r 30(1) of the Companies (Winding-up) Rules 1972 ('the Rules'), but from a paragraph in that affidavit and certain things said by learned counsel for the company during submission about the affidavit, it appeared to me that the company desired to raise the issue of law as to the effect of failure to serve the demand by leaving it at the registered office of the company. So, after I rejected the affidavit, I posed the question whether, in the absence of an affidavit in opposition, the company could nevertheless raise that issue, as it was an issue of law. After hearing and considering submissions on the question, I ruled that the company could raise the issue.

The question that calls for decision is whether by the failure of the petitioners to serve the statutory demand 'by leaving it at the registered office', as required by the said para (a), the company cannot be deemed under the said sub-s 2(a) of the Act to be unable to pay its debts, notwithstanding that the demand was in fact received by the company. In several cases, such as *Cymun Development Sdn Bhd v Supermax Sdn Bhd* [1995] 2 MLJ 233 and *Ann Joo Metal Sdn Bhd v Pembenaan MY Cahaya Sdn Bhd* [2000] 5 MLJ 708, the High Court nevertheless deemed the company unable to pay its debts.

I was at first inclined to think that the respondent company could not be deemed unable to pay its debts. I thought that the phrase 'shall be deemed' in the subsection was not intended to create a presumption at all but actually means 'shall be adjudged', so that there would be no question of a company showing, after the 'deeming' had become operative, that it was able to pay its debts or was solvent. I was also impressed by the opinion of the Court of Appeal of Singapore in *Pac Asian Services Pte Ltd v European Asian Bank AG* [1989] 3 MLJ 385, at p 388 that 'if a petitioning creditor wishes to rely upon the 'deeming' provision in s 254(2)(a) of the Act, strict compliance with the conditions set out therein is necessary' because 'the

presumption that the company is unable to pay its debts does not appear to be a rebuttable one', though it must be mentioned that in that case, the statutory demand has been served at some address other than the registered office and it does not appear that the company nevertheless actually received the demand. Moreover, in *United Malayan Banking Corporation Bhd v Richland Trade & Development Sdn Bhd* [2000] 1 CLJ 57, our Federal Court, at p 63, agreed with our Court of Appeal that in order for the statutory demand to be effective, it must comply strictly with the requirement, besides others, that it be served on the company by leaving it at the registered office, though it must be mentioned that that was not a case of failure to serve the statutory demand at the registered office.

Perceiving that the 'deeming' is irrebuttable, I thought that the provisions of sub-s (2)(a) must be strictly complied with before a company 'shall be deemed unable to pay its debts'. I thought that the requirements of para (a) must be regarded as a legal ritual that must be strictly observed before the 'deeming' could arise. I viewed the requirement as to leaving the demand at the registered office as one that is as crucial to the deeming as the requirement that the sum demanded must exceed RM500. I was certain that if the sum was RM500 the deeming would not arise, but it would if the sum were RM501, even though the difference is only RM1. So I thought that if, where the sum is concerned, RM1 less would inhibit the deeming, then, where service is concerned, anything less than service at the registered office would not do, notwithstanding that the company did receive the demand.

My basis for thinking that sub-s (2)(a) must be complied with with such strictness is now demolished with the citing by learned counsel for the petitioners of *Malaysia Air Charter Company Sdn Bhd v Petronas Dagangan Sdn Bhd* [2000] 4 CLJ 437, where the Federal Court, at p 451, said this:

> It should however be borne in mind that s 218(2)(a) does not create separate grounds for winding-up, but provides a mode of proof available in aid of an application seeking a winding-up on the ground specified in s 218(1), viz, that the company is unable to pay its debts (*Ataxtin*). A company will not be wound up, even if it fails to heed a valid notice, if it can establish by independent evidence that it is solvent (*Re Fabo*).

It means that the 'deeming' is a presumption that is rebuttable.

To hold that failure to serve the statutory demand on a company by leaving it at the registered office will inhibit the deeming of the inability to pay its debts even though it did receive the demand by service otherwise and yet failed to satisfy it would run contrary to reason and good sense, and would be justified, if at all, only if the deeming is irrebuttable. Since according to the Federal Court the deeming is rebuttable, a rational approach to the requirement of service of the statutory demand at the registered office is called for, and the rational approach is to treat the requirement as no more than a prescribed method of service that is legally foolproof, but default in the observance of which is not prejudicial to the deeming if the company did in fact receive the statutory demand by service by some other means or at some other place.

A The company here is therefore deemed to be unable to pay its debts. Since there is no evidence to show that it is actually able to pay its debts or is commercially solvent, the petitioners are entitled to an order of winding-up. I make orders in terms of prayers (a), (b) and (c) of the petition.

Winding up of the company ordered.

B

Reported by Anitha MI Raman

C

D

E

F

G

H

I